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Federal Communications Commission
Office of Secretary

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: September 28, 1999

REPLY TO

ATTN OF: John Stanley *ENC for JS*
Policy & Program Planning Division
Common Carrier Bureau
445 12th , S.W., Room 5-C264
Washington, D.C. 20554

SUBJECT: CC Docket No. 98-121 and 98-56

TO: Ms. Magalie Roman Salas
445 12th , S.W., Room TWB-204
Washington, D.C. 20554

Please place the attached letter into the record of CC Docket 98-121 and CC Docket 98-56. If you require further information, please feel free to contact me at (202) 418-1580. Thank you for your assistance.

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Federal Communications Commission
Washington, D.C. 20554

September 28, 1999

Priscilla Hill-Ardoin
Senior Vice President-FCC
SBC Telecommunications, Inc.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005

Dear Ms. Hill-Ardoin:

On August 31, 1999, members of the Common Carrier Bureau staff met with representatives from Southwestern Bell Telephone ("SWBT") to discuss SWBT's proposed voluntary enforcement mechanism, the "Performance Remedy Plan" (the "Plan"), which is designed to deter poor performance in the provision of resale services and unbundled network elements to competitors. The Plan was developed through a collaborative process in Texas in conjunction with a proceeding addressing SWBT's application for authority to provide in-region, interLATA services under section 271 of the Telecommunications Act. We appreciate and commend the work of the Texas Public Utilities Commission, in conjunction with SWBT and other participating parties, in developing the Plan. We share the Texas Public Utilities Commission's goal of ensuring that SWBT's performance will not deteriorate after the company receives section 271 authorization, and believe the Plan represents a critical step in this direction.

I would like to take this opportunity to summarize the Bureau's concerns, as expressed by the staff at the August 31st meeting. These views represent the current thinking of the Common Carrier Bureau and are in no way binding on the Commission. Any final determination concerning the merits of this performance plan will be made based on the record in the section 271 application for Texas. It is my hope, however, that the Bureau's views on these issues will provide useful guidance to you and other Bell Operating Companies in formulating successful section 271 applications.

1. Exclusion Of CLECs From The Plan's Tier 2 Mechanisms

The Bureau is concerned that the Plan's "Tier 2" mechanism will address SWBT's performance only with respect to a sub-set of competitive local exchange carriers ("CLECs") operating in Texas, rather than all CLECs, and thus will inadequately protect the competitive marketplace as a whole. The Plan contains two levels of incentive mechanisms. First, Tier 1 addresses SWBT performance with respect to individual CLECs, providing for SWBT payments to a particular CLEC when an out-of-

parity result occurs. Tier 1 would replace any existing liquidated damages provisions in a CLEC's interconnection agreement with SWBT. Second, Tier 2 addresses SWBT performance with respect to all CLECs in the aggregate, providing for SWBT payments to the Texas state treasury when an out-of-parity result occurs. SWBT has proposed making the Plan available to CLECs in Texas as an attachment to its Proposed Interconnection Agreement. A CLEC wishing to participate in the Plan would be required to "opt into" this attachment. As currently proposed, only performance data associated with those CLECs that decide to opt into the Plan (and thereby agree to replace their negotiated liquidated damages provisions with the Tier 1 remedies) would be included in the Tier 2 mechanism.

The Bureau is seriously concerned that the exclusion from the Tier 2 performance mechanism of CLECs that choose not to opt into the Plan could substantially weaken the important deterrent effect of this aspect of the Plan. Indeed, if several CLECs decide not to opt into the new enforcement plan, then the protections offered to competition by Tier 2 on paper may not be realized in practice. Specifically, excluding any CLEC from Tier 2 would necessarily decrease the number of data observations. Because the payments under Tier 2 for most measurements are calculated on a "per-occurrence" basis, the exclusion of CLECs not opting into the Plan, and their corresponding "occurrences," could substantially reduce the amounts at stake under Tier 2 in the event SWBT fails to achieve the performance standards. Accordingly, staff suggested that Tier 2 should address SWBT's performance with respect to all CLECs operating in the state. The Bureau is aware of no operational reason for excluding from the Tier 2 incentive structure those CLECs that choose to retain their own negotiated liquidated damages provisions. In fact, SWBT indicated to Bureau staff that it already collects performance data for all CLECs, and will continue to do so after receiving section 271 authorization, regardless of whether certain CLECs decide not to opt into the Plan.

2. Caps on Liability for Poor Performance

The Bureau is also concerned that the \$120 million annual cap on SWBT's potential payments for poor performance under the Plan may be too low to foster parity performance in a market the size of Texas. In particular, the Bureau believes that the potential liability under such a plan must be high enough that an incumbent could not rationally conclude that making payments under an enforcement plan is an acceptable price to pay for hindering or blocking competition.

As a first step, the Bureau urges SWBT to consider increasing the \$120 million cap on payments under its plan. When viewed as a percentage of SWBT's in-state gross local revenues (approximately 2.19%), this amount of potential liability may be insufficient to provide the assurances discussed above. As a second step, we emphasize that SWBT must justify whatever cap is finally proposed. The Bureau is open to considering whether there is a reasoned basis for concluding that the proposed annual cap of \$120 million would provide adequate incentives for maintaining performance levels. Finally, SWBT may wish to consider adding some form of a "procedural cap" to its Plan, under which an administrative proceeding to identify and correct performance problems

would be instituted automatically after payments under the Plan reach a pre-determined amount during the course of a year.


3. Adequate Incentive Payments Associated With Low-Volume Services

The Bureau is concerned that the Plan may not offer adequate protection for nascent, low-volume services (particularly, innovative "advanced services"), as opposed to services with higher CLEC volumes. The reason for this is imbedded in the design of the plan. The vast majority of performance measurements under the current plan provide for payments calculated on a per-occurrence basis. For such measurements, payments would reach substantial and meaningful levels when the number of out-of-parity occurrences is high – that is, when a measurement is considerably out-of-parity for a service with high volumes, such as Resale POTS service. The converse also is true: payments necessarily will be small for low-volume services because the number of occurrences will be low, even if a CLEC suffers seriously degraded service. Competition could be significantly affected by poor incumbent LEC performance in providing specialty services used by small CLECs, or nascent services (particularly, innovative "advanced services") that have not yet achieved high commercial volumes.

We hope that this letter will be useful to your company in preparing a successful section 271 application. We emphasize, however, that, while this letter sets forth the Bureau's major existing concerns about SWBT's performance assurance plan, it is likely that additional concerns will arise in the context of other section 271 proceedings. Also, any final determinations regarding this proposed Plan will be made by the Commission based on the record of SWBT's 271 application for the State of Texas.

For information purposes, a copy of this letter will be placed in CC Docket No. 98-121¹ and CC Docket No. 98-56.²

Sincerely,


FOR Lawrence E. Strickling, Chief
Common Carrier Bureau
Federal Communications Commission

cc: Ms. Magalie Roman Salas
Secretary
Federal Communications Commission

¹ Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599 (1998).

² Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Docket No. 98-56, Notice of Proposed Rulemaking, 13 FCC Rcd 12817 (1998).